

REMARKS

Claims 26, 27, 29-30 were provisionally rejected for obviousness-type double patenting over claims 24, 25, 27-30 of copending application Serial No. 10/099,287. Claims 26, 27, 29-30 were provisionally rejected for obviousness-type double patenting over claims 26-30 of copending application Serial No. 11/270211. Applicants again acknowledge these rejections. However, since these rejections are only provisional, no response is required by Applicants at this time.

Claims 26-33 stand rejected under 35 USC 102(e) as being anticipated by Kneipp III. This rejection is again respectfully traversed.

As previously explained, the Examiner has relied on paragraphs 0047-0049, 0052, 0056 and claims 173-179 of U.S. Pub. No. 2005/0003376 (hereinafter "Kneipp III") to reject apparatus claims 26-33. A careful reading of Kneipp III shows that claims 173-179 are nowhere supported in the specification of Kneipp III. Therefore, the effective filing date of claims 173-179 of Kneipp III is the filing date of Kneipp III, which is November 26, 2003. Therefore, the reliance on the disclosure of claims 173-179 of Kneipp III to reject claims 26-33 is incorrect.

In response, the Examiner maintains that "neither Applicant nor the Patent office through prosecution of Kneipp III have establish that Kneipp III is not prior art against the claims of the instant invention." The Examiner has misunderstood Applicants argument. Applicants do not contend that Kneipp III in its entirety does not qualify as prior art. Rather applicants maintain that subject matter of claims 173-179 is not prior art since support for the subject matter of these claims was not supported by the earlier filings. Accordingly, the earliest date that the subject matter of these claims is entitled to is November 26, 2003, after the filing date of this application.

In addition, the Examiner has not shown that an enabling disclosure of the claimed invention was provided in a reference prior to Applicants filing date. Specifically, MPEP 2121.01 states:

"In determining that quantum of prior art disclosure which is necessary to declare an applicant's invention 'not novel' or 'anticipated' within section 102, the stated test is whether a reference contains an 'enabling disclosure'... ." *In re Hoeksema*, 399 F.2d 269, 158 USPQ 596 (CCPA 1968). The disclosure in an

assertedly anticipating reference must provide an enabling disclosure of the desired subject matter; mere naming or description of the subject matter is insufficient, if it cannot be produced without undue experimentation. *Elan Pharm., Inc. v. Mayo Found. For Med. Educ. & Research*, 346 F.3d 1051, 1054, 68 USPQ2d 1373, 1376 (Fed. Cir. 2003)

As previously explained, the subject matter of claims 173-179 was not described prior to applicants filing date. Further, the subject matter of claims 173-179 were not enabled prior to this date as well. Accordingly, the rejection of claims 26-33 as being anticipated by Kneipp III should be withdrawn.

Claim 34 stands rejected under 35 USC 112, second paragraph, as being indefinite. Specifically, the Examiner maintains that the recitation of "substantially" is unclear. This word has been removed from this claim. Accordingly, this rejection is now moot.

In view of the above, each of the presently pending claims in this application is believed to be in immediate condition for allowance. Accordingly, the Examiner is respectfully requested to withdraw the outstanding rejection of the claims and to pass this application to issue. If it is determined that a telephone conference would expedite the prosecution of this application, the Examiner is invited to telephone the undersigned at the number given below.

In the event the U.S. Patent and Trademark Office determines that an extension and/or other relief is required, applicants petition for any required relief including extensions of time and authorizes the Commissioner to charge the cost of such petitions and/or other fees due in connection with the filing of this document to **Deposit Account No. 03-1952** referencing docket no. **070702007620**.

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Respectfully submitted,

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